SUGU K & PARTNERS v. HAI SAN & SONS SDN BHD; PUBLIC BANK BHD (APPLICANT)

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[POST COMPANY WINDING UP PETITION NO: WA-28NCC-72-01-2018]
12 OCTOBER 2018

COMPANY LAW: *Liquidators – Removal – Application for – Applicant presented winding-up petition against company and proposed appointment of liquidators – Discovery that company had been wound up by petitioner and liquidators had been appointed – Applicant withdrew winding-up petition and applied to appoint joint and several liquidators in substitution of appointed liquidators – Whether being largest/majority creditor of company gave leverage to applicant to appoint preferred liquidators – Whether winding-up petition by petitioner bona fide – Whether tactical manoeuvre and contrived to thwart applicant's winding-up petition and appointment of proposed liquidators – Whether application ought to be allowed – Whether it was in interest of liquidation that liquidators be removed/substituted – Companies Act 2016, ss. 376, 383, 469, 477 & 482 – Rules of Court 2012, O. 30*

The applicant had granted facilities to the respondent and as a security for these facilities, the respondent granted the applicant two legal charges over some pieces of land ('the lands'), together with fixtures, structures and all things attached to the lands ('the charged properties'). When the respondent defaulted in the payment of the facilities, the applicant presented a winding-up petition against the respondent ('the applicant's winding-up petition') and in the said application, the applicant proposed two liquidators ('the proposed liquidators'). However, on the hearing date of the applicant's winding-up petition, the applicant discovered that the respondent had been wound up by the petitioner and two liquidators were appointed ('the current liquidators'). This prompted the applicant to withdraw its winding-up petition and to file the present application to appoint joint and several liquidators in substitution of the current liquidators, pursuant to ss. 376, 383, 469, 477 and 482 and Sch. 6 of the Companies Act 2016 ('CA') and O. 30 of the Rules of Court 2012 ('ROC') and/or the inherent jurisdiction of the court ('encl. 19'). In support of encl. 19, the applicant submitted that (i) the amount indebted to the petitioner was merely RM15,500; (ii) the applicant was the largest/majority creditor of the respondent as the respondent was indebted to the applicant for a sum of RM20,907,904.64, being the amount due and owing by the respondent for the facilities granted; (iii) the respondent failed to notify the applicant about the winding-up petition by the petitioner; (iv) the manner and nature in which the winding-up petition by the petitioner proceeded did not appear *bona fide* as it appeared to be a tactical manoeuvre and contrived to thwart the applicant's winding-up petition and the appointment of the proposed liquidators; (v) the charged properties were directly adjacent to the lands belonging to the respondent's related company,

Hai San Holdings Sdn Bhd ('HSH') and charged to OCBC Bank (Malaysia) Sdn Bhd ('OCBC Bank'); and (vi) since OCBC Bank had also presented a winding-up petition against HSH, it would be prudent and/or practical for a common liquidator to be appointed to determine whether or not to sell and/or dispose the lands. Opposing encl. 19, the petitioner submitted that (i) the appointment of the current liquidators was in order and as such, the application filed by the applicant was premature; (ii) the purported tactical manoeuvre raised by the applicant was highly unfounded and without basis; and (iii) on the issue of majority/largest creditor, the views of the other unsecured creditors were also relevant since their rank was in *pari passu* against all the other unsecured creditors of the respondent. The current liquidators argued that (i) the applicant failed to show the court that (a) the current liquidators had acted against the substantial and real interest of the liquidation of the respondent; and (b) the current liquidators were not able to execute the sale of the charged properties; (ii) due to the applicant's failure to participate in the winding-up petition proceedings presented by the petitioner, the applicant was not permitted to file a subsequent application to seek the court to choose between two or more competing candidates for the position of liquidators; (iii) while majority view of the creditors ought to be recognised, it did not entitle the majority creditor to disregard the view of the other creditors of the respondent; and (iv) the applicant failed to show that the respondent had incurred unnecessary costs upon the appointment of the current liquidators.

Held (allowing encl. 19):

(1) The applicant's application was made pursuant to, *inter alia*, s. 482 of the CA. The primary prayer sought by the applicant impliedly meant the removal of the current liquidators. The court has been empowered with a wide discretion to remove a liquidator on cause shown and there is no specific methodology or formula attached to the word 'cause shown'. It is not necessary to establish misconduct in order to remove the liquidator and it can be done so on the ground that it is in the interest of the liquidation that he should be replaced and to protect the interest of the creditors and/or contributories. (paras 21-23)

(2) The winding-up petition by the petitioner and the appointment of the current liquidators was for a mere debt of RM15,500. The winding-up petition by the petitioner was a tactical manoeuvre and an abuse of the court process as it was filed for a collateral purpose, namely to thwart the applicant's winding-up petition against the respondent and its application to appoint the applicant's proposed liquidators. The applicant was denied the opportunity to appoint the proposed liquidators who would be better placed to realise the assets of the respondent for the benefit of the creditors. (paras 28 & 32)

(3) As one of the majority creditors of the respondent, the applicant's view on the appointment of liquidators of the respondent ought to be taken into account. The proposed liquidators were the preferred choice of the majority of the creditors of the respondent as it would be in the interest of liquidation for the current liquidators to be removed and substituted with the proposed liquidators to safeguard the rights and interest of the applicant as one of the majority creditors of the respondent. (para 36)

(4) Having regard to the geographical proximity of the applicant's charged properties and the lands charged to the OCBC Bank and the encroachment of the applicant's charged properties onto the lands charged to the OCBC Bank, it would be more prudent and practical for a common liquidator to be appointed to determine whether or not to dispose of the lands on its own or to dispose the lands together with the lands charged to the OCBC Bank to enable a smooth and cost-effective realisation of all the lands in the interest of the respondent's liquidation. (para 38)

Case(s) referred to:

Bina Puri Sdn Bhd v. Jambulingam Sethuraman-raki C/O Rimbun Corporate Advisory Sdn Bhd [2011] 1 LNS 1345 HC ***(refd)***

Malayan Banking Bhd v. Chip Lam Seng Enterprise Bhd [2015] 5 CLJ 260 HC ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Rafan Holdings Sdn Bhd v. Chip Lam Seng Sdn Bhd [2015] 1 LNS 265 HC ***(refd)***

Sibu Slipway Sdn Bhd v. Yii Chee Ming & Ors And Other Appeals [2017] 6 CLJ 507 CA ***(refd)***

T R Hamzah & Yeang Sdn Bhd v. City Centre Sdn Bhd [2011] 1 LNS 1221 HC ***(refd)***

Yeo Ann Kiat & Ors v. Hong Leong Bank Bhd & Anor [2016] 9 CLJ 207 CA ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 376, 383, 469, 477, 482, Sixth Schedule
Companies Act 1965 (since repealed), s. 243(1)
Evidence Act 1950, ss. 2, 73A(1), (4)
Rules of Court 2012, O. 30

Other source(s) referred to:

Walter Woon, *Company Law*, 2nd edn, pp 704-722
Halsbury's Laws of Australia, vol. 8, para 120-13305

For the applicant - Samuel Tan & Julian George; M/s Shook Lin & Bok
For the petitioner - Idris Seydalavi; M/s Risma & Idris
For the liquidators - Andrew Heng, Heng Ji Keng, S Ravenesan & Siti Nur Amirah Aqilah Adzman; M/s S Ravenesan

Reported by Najib Tamby

A

JUDGMENT

Lau Bee Lan J:

Introduction

B **[1]** On 22 March 2018, upon the presentation of the winding-up petition by the petitioner, the respondent company was wound up with costs of RM5,000 while Dato' Heng Ji Keng and Andrew Heng both of Ferrier Hodgson MH Sdn Bhd be appointed as the liquidators of the respondent company ('the current liquidators').

C **[2]** On 24 April 2018, Public Bank Berhad ('the applicant') filed an application to appoint joint and several liquidators in substitution of the current liquidators of the respondent (encl. 19) pursuant to ss. 376, 383, 469, 477, 482 and Sixth Schedule of the Companies Act 2016 ('CA 2016'), and O. 30 of the Rules of Court 2012 and/or the inherent jurisdiction of the court.

D **[3]** After hearing submissions from all the parties, I allowed encl. 19 (prayer 1) with no order as to cost on 11 July 2018. Dissatisfied with my decision, the petitioner appealed.

The Applicant's Submission

E **[4]** Pursuant to several letters of offer ('the said agreements') the applicant granted the following facilities to the respondent:

(a) an overdraft facility of RM5.5 million;

(b) a term loan facility of RM6.5 million;

F (c) a term loan facility of RM8.6 million; and

(d) a term loan facility of RM4.5 million.

('the said facilities')

G **[5]** As security for the said facilities, amongst others, the respondent granted the applicant two legal charges, both dated 26 January 2005 over the lands held under HS(D) 23023, Lot No. P.T.506 and HS(D) 5848, Lot No. P.T.507, Mukim Klang, Selangor Darul Ehsan ('the lands') together with the fixtures, other supporting structures and all things attached to the said lands including but not limited to the following

H

(a) Single storey detached factory section A;

(b) Single storey detached factory section B (vacant);

(c) Single storey detached factory section C (vacant);

I (d) 2.5 storey office building (Haisan office);

(e) 1.5 storey detached factory (cross docking factory);

(f) Single storey detached factory - Factory A;

(g) Single storey detached factory - Factory B (vacant); and

(h) Temperature-controlled complex (including the loading platform, cold rooms, toilets and battery charger room), (collectively referred to as ('the charged properties')).

[6] The respondent had utilised the said facilities but has defaulted in payments of amounts due and owing to the applicant under the said facilities, resulting in the said facilities being recalled by the applicant.

[7] On 24 May 2017, the applicant commenced foreclosure proceedings and obtained an order for sale under Shah Alam High Court Originating Summons No. BA-24FC-668-05-2017 over the charged properties on 25 January 2018. The applicant did not proceed with the court auction on 1 March 2018.

[8] The applicant submitted that it is the largest/majority creditor of the respondent whereby the respondent is indebted to the applicant for a sum of RM20,907,904.64 as at 17 March 2017 being the amount due and owing by the respondent for the said facilities granted by the applicant.

[9] The applicant had on 29 May 2017 presented a winding-up petition against the respondent under the Shah Alam High Court Companies Winding-up Petition No:BA-28NCC-248-05-2017 ('applicant's winding-up petition'). In the applicant's winding-up petition, the applicant also prayed for the appointment of Mr Ong Hock An and Mr Mok Chew Yin, both of Messrs BDO Consulting Sdn Bhd, as joint and several liquidators of the respondent (applicant's proposed liquidators').

[10] The hearing of the applicant's winding-up petition was initially fixed on 4 October 2017 but postponed several times upon the request of the respondent to settle as well as to hear two applications for restraining order ('RO') filed by the respondent to restrain all proceedings against the respondent and its related companies (including winding-up proceedings). They are as follows:

(i) First RO application dated 29 September 2017 was filed by the respondent one day before the hearing of the applicant's winding-up petition and fixed for hearing on 9 November 2017 which was withdrawn by the respondent.

(ii) On 9 November 2017, the respondent sought an adjournment of about two months to settle with the applicant and the hearing of the applicant's winding-up petition was adjourned to 15 January 2018.

(iii) On 15 January 2018, the respondent filed the second RO application dated 12 January 2018 which resulted in the applicant's winding-up petition and the second RO application to be adjourned to 26 March 2018.

[11] However, on 26 March 2018 which is the hearing date of the applicant's winding-up petition and the second RO application in Shah Alam High Court, the applicant's solicitor was informed that the respondent has been wound up on 22 March 2018 by the petitioner, Sugu K & Partners, in the proceedings herein, and that Dato' Heng Ji Keng and Andrew Heng were appointed as joint liquidators of the respondent. The applicant then withdrew the applicant's winding-up petition and filed its application under encl. 19 herein.

[12] As compared to the applicant, the amount indebted to the petitioner is merely RM15,500. The winding-up petition by the petitioner herein ought to have been notified to the applicant by the respondent but this was not done. The respondent also failed to inform the court of the RO applications filed in Shah Alam High Court. In fact, the manner and nature in which the winding-up petition by the petitioner herein proceeded does not appear *bona fide* and raises the question as to whether the winding-up petition by the petitioner herein was a tactical manoeuvre and contrived to thwart the applicant's winding-up petition and the appointment of the applicant's proposed liquidators.

[13] It was further submitted that the applicant's charged properties are directly adjacent to the lands belonging to the respondent's related company, Hai San Holdings Sdn Bhd and charged to OCBC Bank (Malaysia) Berhad ('OCBC Bank') namely, under HS(M) 11745 PT 9998 Mukim Klang, Daerah Klang, HS(M) 32121 PT 73157 Mukim Klang, Daerah Klang and HS(M) 32122 PT 73158 Mukim Klang, Daerah Klang. OCBC Bank had also presented a winding-up petition against Hai San Holdings Sdn Bhd under Shah Alam High Court Companies Winding-up Petition No: BA-28NCC-179-04-2017 whereby OCBC Bank prayed for the appointment of Mr Ong Hock An and Mr Mok Chew Yin as joint and several liquidators. Hai San Holdings Sdn Bhd was then wound-up and Mr Ong Hock An was appointed as the sole liquidator. Thus, it would be prudent and/or practical for a common liquidator to be appointed to determine whether or not to sell and/or dispose of the lands on its own or alternatively to sell and/or dispose of the lands charged to OCBC to enable a smooth and cost effective realisation of all the lands in the interest of the respondent's liquidation.

The Petitioner's Argument

[14] The petitioner submitted that the appointment of the current liquidators is in order and as such, the application filed by the applicant is premature.

[15] The issue of purported tactical manoeuvre raised by the applicant is highly unfounded and made without basis.

[16] On the issue of majority/largest creditor, it was submitted that the views of the other unsecured creditors are also relevant since their rank is in *pari passu* against all the other unsecured creditors of the respondent.

The Liquidators' Argument

[17] It was submitted by the current liquidators that the applicant had failed to show the court that the current liquidators of the respondent had acted against the substantial and real interest of the liquidation of the respondent. The applicant had also failed to show that the current liquidators of the respondent were not able and incapacitated in any way to execute the sale of the charged properties of the respondent in the interest of the liquidation of the respondent.

[18] Due to the applicant's failure to participate in the winding-up proceedings before the court, it does not permit the applicant to file a subsequent application to seek the court to choose between two or more competing candidates for the position of liquidators.

[19] Further, whilst the majority view of the creditors ought to be recognised, it did not entitle the majority creditor to disregard the view of the other creditors of the respondent ie, the petitioner. Hong Leong Bank Berhad ('HLBB'), the unsecured creditor of the respondent should not be given the highest consideration as HLBB rank in *pari passu* against all the other unsecured creditors of the respondent.

[20] On the issue of the interest of liquidation, the current liquidators submitted that the applicant had failed to show that the respondent had incurred unnecessary costs upon the appointment of the current liquidators of the respondent.

Findings

[21] The applicant's application is made pursuant to, amongst others, s. 482 of CA 2016 which reads

> A liquidator or interim liquidator appointed by the Court may
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> (a) resign from office in accordance with the rules; or
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> (b) on cause shown, be removed from office by the Court.

[22] The primary prayer sought by the applicant for the substitution of the current liquidators impliedly meant the removal of the current liquidators.

[23] The court has been empowered with a wide discretion to remove a liquidator on cause shown and there is no specific methodology or formula attached to the word "cause shown"; it is not necessary to establish misconduct in order to remove the liquidator; it can be done so on the ground that it is in the interest of the liquidation that he should be replaced and to

protect the interest of the creditors and/or contributories (per Hamid Sultan J (now JCA) in *T R Hamzah & Yeang Sdn Bhd v. City Centre Sdn Bhd* [2011] 1 LNS 1221; [2012] 1 MLJ 383 [406 D-E]; Walter Woon, (2nd edn), of *Company Law* pp. 704-722 referred to in *TR Hamzah* at p. 406 B-C; *Halsbury's Laws of Australia*, vol. 8 at para. [120-13305]).

[24] The same approach was adopted in *Yeo Ann Kiat & Ors v. Hong Leong Bank Bhd & Anor* [2016] 9 CLJ 207; [2016] 6 MLJ 499 wherein the Court of Appeal at p. 215 (CLJ); p. 508 [24] (MLJ) opined:

> In most instances, the common grounds advanced to justify the court in removing a liquidator are (i) the liquidator's personal unfitness, and/or (ii) the liquidator's personal misconduct. Be that as it may, we do not think that the power of removal under s 232(1) is confined to that. The court has the power to remove a liquidator if the court is satisfied on the evidence that it is in the interest of the liquidation that he should be replaced; by that we mean all those who are interested in the company being liquidated ... Indeed, it has been said that the measure of due cause is the substantial and real interest of the liquidation ...".

[25] At the outset, I wish to make some observations regarding the liquidators' affidavit in reply (2) affirmed by Andrew Heng on 8 June 2018 (encl. 29) which was made in rebuttal of the applicant's "affidavit tambahan" affirmed by Lui Sze Mun on 30 May 2018 (encl. 23). In the determination of the applicant's application herein, I did not consider paras. 8.4, 8.5, 8.6, 8.7, 8.8, 8.9, 8.10 and 8.11 and 9 of the liquidators' affidavit in reply (2) as these averments are in disregard of the court's direction dated 1 June 2018 that the response ought to be confined to the issue of HLBB's support of the applicant's application herein. Consequently, I did not consider paras. 5, 6, 7 and 8 of the liquidators' further submission dated 21 June 2018 as they are irrelevant to the averments raised in applicant's "affidavit tambahan".

Tactical Manoeuvre To Thwart The Applicant's Winding-up Petition

[26] Having regard to the salient facts alluded at paras. 4 to 10 above, particularly, para. 10, it is highly pertinent to observe the manner in which the applicant's winding-up petition to wind up the respondent proceeded, though presented as early as 29 May 2017 and with the initial hearing date of 15 January 2018 was however adjourned to 26 March 2018. In comparison the winding-up of the petitioner proceeded with extraordinary speed: presented on 17 January 2018 advertised in the Government *Gazette* on 15 March 2018, The Star on 12 March 2018 and 13 March 2018, Malay Mail on 12 March 2018, and 13 March 2018, and the order of the winding-up was then granted on 22 March 2018, four days before the hearing of the applicant's winding-up petition fixed on 26 March 2018.

[27] Despite what had transpired regarding the applicant's winding-up petition, the respondent failed to disclose to the court hearing the winding-up petition by the petitioner at the Kuala Lumpur High Court on 22 March 2018 of the fact that the second RO application dated 12 January 2018 was

afoot (despite the fact the respondent and its related company was desperately seeking to restrain the applicant herein from proceeding with the applicant's winding-up petition at the Shah Alam High Court) and the hearing of the applicant's winding-up petition was adjourned to 26 March 2018 to be heard together with the second RO application.

[28] Against the aforesaid backdrop, I also took into account that the winding-up petition by the petitioner and the appointment of two private liquidators (the current liquidators) was for a mere debt of RM15,500. In my judgment the winding-up petition by the petitioner is a tactical manoeuvre and an abuse of process of the court as it was filed for a collateral purpose, namely to thwart the applicant's winding-up petition against the respondent and its application to appoint two private liquidators, the applicant's proposed liquidators at the Shah Alam High Court.

[29] In this regard, I find the case of *Malayan Banking Bhd v. Chip Lam Seng Enterprise Bhd* [2015] 5 CLJ 260 is relevant and assisted the applicant's case. In *Malayan Banking* (*supra*), there was a petitioner's application to wind up the respondent company based on a summary judgment debt. The petitioner also filed a notice of motion for the appointment to appoint a provisional liquidator. At the same time, the respondent's directors signed a circular resolution, amongst others, for the respondent to be voluntarily wound up and for the appointment of one TCK to be appointed as the respondent's liquidator. The petitioner's counsel was only informed of the voluntary winding-up and the appointment of TCK during the first case management of the petition. The petitioner opposed the appointment of TCK and sought for the appointment to be declared null and void. One of the issues before the High Court was whether the respondent's voluntary winding-up was *bona fide*. In addressing this issue, Wong Kian Kheong JC (now judge) declared the respondent's appointment of the liquidator for the respondent to be null and void, stating several reasons at 282-285 [48], which amongst others, are:

> … **the respondent's voluntary winding-up is not *bona fide* and is contrived to thwart unlawfully both the petitioner's PL application as well as this petition**.
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> … **the respondent's flurry of activities on 5 September 2014** (after the letter dated 2 September 2014 from petitioner's solicitors informing Messrs DNW of the proposed filing of the petitioner's PL application) **and the timing** of the respondent's voluntary winding-up, **can only mean that the respondent's appointment of TCK as the respondent's PL, is intended to stifle unlawfully the petitioner's PL application and this petition**".
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> (emphasis added)

[30] In addition, I drew support from the case of *Sibu Slipway Sdn Bhd v. Yii Chee Ming & Ors And Other Appeals* [2017] 6 CLJ 507; [2017] 1 MLJ 368, where there were disputes between the first and second respondents ('the respondents') and the appellants in relation to the sharing of family assets and

companies which led to nine court proceedings in Kuching High Court. The proceedings in the Kuching High Court included ownership of shares in Sibu Slipway and the respondent's application for preservation order to preserve 1/3 shares of two companies ie, subsidiaries of Sibu Slipway from dissipation by the appellant. The appellants transferred the registered office of the three companies to Shah Alam and obtained winding-up orders against the three companies pending the disposal of the Kuching High Court proceedings. The respondents applied for permanent stay of the winding-up orders under s. 243(1) of the Companies Act 1965 ('CA 1965') and alternatively under the inherent jurisdiction of the court. The High Court granted the respondents' application for a permanent stay under s. 243(1) of the CA 1965. The Court of Appeal held the pertinent issue before them was whether the court could invoke its inherent jurisdiction to set aside, rescind or grant a permanent stay of the three winding-up orders.

[31] In answering the issue, Nallini Pathmanathan JCA (delivering the judgment of the Court of Appeal), amongst others, at p. 514 (CLJ); p. 375 (MLJ) para [15] took into consideration the following matters at pp. 514-516 (CLJ); p. 375 (MLJ) paras [18], [20], [23], [25] and [31]:

> **In short we concur that there was active concealment and/or suppression of material facts to the Shah Alam High Court with regards to**:
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> (a) the respondents' claim to a beneficial interest in the shareholding and assets of the three companies in Suit 16/3 in the Kuching High Court;
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> (b) **the existence of pending proceedings in the Kuching High Court including 16/3, which had been ordered to be tried jointly**; and
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> (c) *the existence of an inter partes preservation of assets application before the Kuching High Court, involving the three companies. Further, that the preservation order was sought by the respondents and was disputed by the appellants.*
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> ...
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> [20] To our minds the foregoing failures, particularly when viewed cumulatively, amounted to an abuse of process of the court.
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> ...
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> [23] The issue of material non-disclosure or suppression of material facts in the course of court proceedings is of fundamental importance in the administration of justice. It is not possible for this court to gloss over facts that disclose deliberate attempts to mislead the court into granting the winding-up orders. Apart from causing prejudice to the respondents, and breaching the rules of natural justice, these acts or omissions amount to an abuse of process of the court.
>
> ...

[25] The foregoing paragraphs explain succinctly the definition of an abuse of process of the court. Applied to the facts of our case, as stated earlier, it is clear that the winding-up petitions were filed for a collateral purpose, namely to frustrate firstly, the application for a preservation of assets in Suit 16/3, and secondly, the joint trial of the nine suits in the Kuching High Court.

[31] **We conclude that this court has the inherent jurisdiction to intervene and set right or remedy an abuse of process in winding-up proceedings, notwithstanding the lack of an express provision in the Act**.

(emphasis added)

[32] I agreed with the submission of learned counsel for the applicant that:

(a) the nature of the abuse of process in *Sibu Slipway* (*supra*) is on all fours with our case where the respondent used the winding-up petition by the petitioner (at Kuala Lumpur High Court) to defeat the applicant's winding-up petition and the appointment of the applicant's proposed liquidators at the Shah Alam High Court;

(b) the tactical manoeuvre committed by the respondent had denied the applicant the opportunity to appoint the applicant's proposed liquidators who will be better placed to realise the assets of the respondent for the benefit of the creditors (for reasons which will be elaborated below).

[33] Following the principle in *Sibu Slipway*, this court has the inherent jurisdiction to intervene and set right the petitioner and the respondent's abuse of the process of court in suppressing material facts as to the existence of the applicant's winding-up petition at the Shah Alam High Court and the respondent's second RO dated 12 January 2018, to reiterate, both of which were fixed on 26 March 2018, just four days before the order for the winding-up petition by the petitioner was granted on 22 March 2018 at the Kuala Lumpur High Court.

Interest Of The Majority Creditors Not Safeguarded

[34] Exhibit PBB12 in encl. 23, "affidavit tambahan" affirmed by Lui Sze Mun is the exchange of emails between the applicant and HLBB whereby the latter confirmed that they were supporting the applicant's application. The current liquidators took objection to the admissibility of exh. PBB12 on the grounds that (i) the manner to prove the inclination by HLBB to support the application of the applicant was not made in a proper manner pursuant to ss. 73A(1) and (4) of the Evidence Act 1950 ('Evidence Act'); and (ii) the deponent of encl. 23 has no personal knowledge and is not the maker of and/or party in relation to the said document.

[35] I find there is no merit in the current liquidators' objection as:

(a) the provisions of the Evidence Act does not apply to affidavit evidence and the hearsay rule does not apply by virtue of s. 2 of the Evidence Act;

(b) encl. 23 is based on information and knowledge obtained from records and documents which included documents forwarded by the applicant's solicitors to which the deponent of encl. 23 has access and the deponent has stated the sources and grounds for the statements made in encl. 23; and

(c) in any event, there is an "affidavit tambahan Hong Leong Bank Berhad" wherein it is expressly stated that HLBB is an unsecured creditor of the respondent for RM7,853,450.14 as at 31 August 2017 and HLBB supported the applicant's application.

[36] As the majority creditors of the respondent, the applicant and HLBB's view on the appointment of liquidators of the respondent ought to be taken into account especially when I have found there is tactical manoeuvre by the respondent and the petitioner to thwart the applicant's winding-up petition and application to appoint the proposed liquidators. Hence, in my judgment, the applicant's proposed liquidators are the preferred choice of the majority of the creditors of the respondent as it would be in the interest of liquidation for the current liquidators to be removed and substituted with the applicant's proposed liquidators to safeguard the rights and interest of the applicant and HLBB as the majority creditors of the respondent.

[37] In this regard, I agreed with the view expressed by Hamid Sultan J (now JCA) in the case of *Bina Puri Sdn Bhd v. Jambulingam Sethuraman-raki C/O Rimbun Corporate Advisory Sdn Bhd* [2011] 1 LNS 1345; [2012] 8 MLJ 141 at pp. 150 and 151 as follows:

> it is trite the liquidator can only be removed on cause shown. In this respect the majority view of the creditors cannot be brushed aside ... There are sufficient authorities in such application the majority view of the creditors and/or contributories play a significant role, and the overriding consideration is that the court must be satisfied that it is against the interest of the liquidation ...,
>
> In this respect the observation of the learned authors of *Halsbury's Laws of England*, (4th Ed), at p 671 para 1154 is useful for the purpose of the instant application and that relevant part reads as follows:
>
> > The liquidator may also be removed by the court on cause shown on the application of a creditor or contributory ... In considering whether a liquidator should be removed, **importance is attached to such factors as that the majority of the company's creditors will be paid off by a large creditor if his nominee is appointed, or that the majority is dissatisfied with the existing liquidator**, especially if some of them are willing to act without remuneration".
> >
> > (emphasis added)

Effectiveness In Appointing A Common Liquidator

[38] The applicant was informed by the Haisan Group (of which the respondent and Hai San Holdings Sdn Bhd are a part of) that the applicant's charged properties encroaches the lands charged to OCBC. Having regard to the geographical proximity of the applicant's charged properties and the lands charged to OCBC and the encroachment of the applicant's charged properties onto the lands charged to OCBC, it would be more prudent and practical for a common liquidator to be appointed to determine whether or not to dispose of the lands on its own or to dispose the lands together with the lands charged to OCBC to enable a smooth and cost effective realisation of all the lands in the interest of the respondent's liquidation.

[39] In this regard, I relied on the case of *Rafan Holdings Sdn Bhd v. Chip Lam Seng Sdn Bhd* [2015] 1 LNS 265, a case where the respondent was part of the Chip Lam Seng group of companies, and the holding company of the CLS Group is Chip Lam Seng Enterprise Bhd ('CLSE'). The petitioner had obtained a winding-up order and appointed TGP as the liquidator of the respondent on 3 July 2014, whereas DTK was appointed as the liquidator of CLSE. The court held as follows (p. 23 para 27):

> Further I am of the view there is merit in considering that *the assets belonging to the CLS Group can be liquidated in a more efficient and cost effective manner if a common liquidator in the person of DTK be appointed in substitution of TGP* given the following circumstances:
>
> (ii) "By virtue of his appointment as liquidator of CLSE under the AmBank's Order".
>
> (emphasis added)

[40] Given my finding that there is tactical manoeuvre on the part of the respondent, it is my considered view that the petitioner and the respondent cannot be allowed to benefit from its own wrong which is a principle of universal application (per Gopal Sri Ram JCA (as he then was) in *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577 at pp. 581 h-i to p. 582 a).

Conclusion

[41] For all the foregoing reasons, I found that the applicant has on cause shown that the current liquidators be removed from office and be substituted with the applicant's proposed liquidators and accordingly I granted O.I.T. of prayer 1 of encl. 19.